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The Legal Regulation of Illegal and Harmful Content on the Internet

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Addressee: the Hungarian Ministry of Informatics, Department for Legal Regulation.

Overview: Why should government take steps?

Analysis of the present situation:

Internet should be regarded as a public good. Being ownerless, it is becoming to get occupied on a first come, first serve basis. This can well be compared to the American West [Biegel], or the British inclosures [Lessig]. This is now happening by ways of cookies, passwords, requiring credit card numbers, registration, zoning. So as to exercise more control, interest groups collect data about our preferences.

State should represent the rights of the individual as opposed to commercial interest groups.

Therefore:

Government should take steps to ensure free online communication. This will require that the government takes position contrary to the commercial interests. Where there is a collision between civil rights and commercial interests, the state is supposed to represent civil interests.

1. Policy proposals relating to self-regulation

Is co-regulation of illegal and/or harmful content feasible?

In my paper I will distinguish self-regulation and co-regulation. I call voluntary associations with a code of conduct *self-regulative* – despite of my strong belief that these organizations do not fulfill any role comparable to regulation as such. I would rather compare them to interest-promoting organizations. Under co-regulation I understand a structure where the state borrows its legitimate violence to a bottom-up organized organization, either by recognizing its rules through legislation, or by enforcing its decisions, similarly to arbitration courts.

I differentiate the following levels of state interference:

Type 1. ISPs' association voluntarily organized, with voluntary membership. If the resolutions of the association are violated, the maximum sanction is exclusion from the organization.

This is a purely representation the interests of the same profession, like a trade union.

Type 1.a. ISPs' and Internet content providers' (ICPs') organization, possibly including representatives of other groups, voluntarily organized, with voluntary membership.

Has more legitimacy compared to the previous one, because it represents a wider shift of society. A harmonization of different interests must be done. Good in mediation and consultance.

Type 2. State recognizes the code of conduct only by not passing parallel legislation. It provides enforcement to the resolutions of the association.

Similarly to arbitration courts, the state recognizes the code as a contract between the parties, and provides for its enforcement. Quitting membership terminates the obligation. This is between the clear models of co-regulation and self-regulation.

Type 3. State mandates the voluntarily organized association to make a code, and helps to enforce the code.

Similarly to a professional chamber, apt to substitute legal rules. The problem is with democratic deficit: which organization should the state chose, and what gives legitimacy to the organization. Should the code apply to members only, or to everybody? I call this a co-regulative model.

Type 4. State provides the frames, including financial means, for an organization, the members of which are delegated by association of ISPs, ICPs and further civil groups. The organization's mandate is to make a code and decide in disputes. State provides for the execution of the rules and decisions.

This structure is similar to a committee or a board of trustees. Very close to an authority. Delegation procedure of the representative my be problematic. The legitimacy and representative justification of the delegates remains always questionable.

Type 5. State incorporates the rules recommended by the organization.

The organization fulfils a role of expertise consultant or lobby group. Acceptable only if different actors interests are harmonized, such as commercial content providers, users, ISPs, children, etc. Question of legitimacy is the same as in the other cases.

The logic of a new regulation

The internet is in the course of becoming regulated. This regulation is not officially drafted by the appropriate state organs, instead it is naturally developing through technology, and is lead by market forces.

The most influential actors of the Internet society are big commercial corporations. They are in the situation to introduce technological codes, such as passwords and other technological tools to control internet use. The biggest the corporations are, the more influence they exercise.

Legal rules should follow social norms. Therefore formation of social norms flexibly is required before state can impose authoritative regulation.

However, state enforcement is not the only way of sanction: society does impose sanctions, too. For example, beyond the official sanctions prescribed by penal law, the criminal is sanctioned by the disregard of society, a.k.a. stigmatization.

This social power is exploited by self-regulatory organizations when they apply exclusion as the ultimate sanction. But under market circumstances this causes a disadvantage only for smaller market actors. Powerful actors do not need the support of the association, they will dictate the rules.

The motivation behind self-regulation:

The logic of self-regulation can be compared to that of international agreements: states join voluntarily to international conventions, but if they notice the convention or violate its rules, the only sanction can be the disapproval of other states. If the state is a leading power, such as the United States, then it does not have compelling interests to comply with the rules taken voluntarily or to belong to an organization. Therefore it may give preference to its direct economic or military interest, as we have witnessed when they noticed the Kyoto convention or ignored the lack of UNO empowerment.

Pros of self-regulation

1. Decision-making is done at the local level, where the problems are the most understood, the needs are more directly perceived.

2. The rapid development of the internet requires speed reaction: self-regulation is more responsive and flexible.

3. Since the main actors are representatives of the Internet industry, technological knowledge and understanding is given.

4. The Internet's structure makes it perfect tool for horizontal organizations, enables cheap and quick communication among many actors.

5. It may comprise the representatives of all relevant groups: users, content providers, access providers, infrastructure providers, as well civil organizations of parents, of children, of teachers, etc.

6. Self-regulation entails an increased level of voluntary compliance, mainly because of the wider consensus, and because of the rule-making being responsive to the needs.

7. It is more cost-effective than the state burocracy's decision-making.

8. The European Union's declared policy is to encourage self-regulation.

Cons – of self-regulation

1. Self-regulation is market-driven. The financially most powerful market actor is the most influential actor of self-regulation. It respects other values only superficially, as far as they further financial interests.

2. The most powerful market actor is not bound to follow the organization's decisions, it may dictate the rules.

3. Does not substitute law, because enforcement of the norms would be unconstitutional in the current legal system. Only law can prescribe duties and restrict rights. It cannot provide legal security, because the resolutions are not compulsory.

Co-regulation

One type of co-regulation is where the organization comprises more levels of the internet society: service providers, users, civil organizations, research groups, etc. Another type of co-regulation when state recognizes the norms of the self-regulative organization as official and borrows its power to enforce them. Contrary to self-regulation, it is no more voluntary. But there is a strong problem with the legitimacy of these organizations: only the Parliament or the authorized organ may impose rights and obligations on every citizen.

Pros of co-regulation:

1. Decision-making is done at the local level. Technological knowledge, democratic participation, flexibility are given, see the pros of self-regulation.

2. Compared to self-regulation, it brings legal security, because it can be enforced.

Cons of co-regulation:

1. It suffers in a democratic deficit because there is a lack of empowerment of decision-makers.

2. Even if constitutional legitimacy is granted by a legal rule that mandates the organization to pass rules and decisions, and its members are delegated by social organizations and professional associations, it remains always questionable whether those members represent everybody to whom their decisions apply.

Conclusion: Liberties can only be restricted by laws passed by the Parliament, therefore these decision-making bodies cannot impose more restrictive norms than the already existing laws.

Summary:

a) Voluntary organization does not substitute legal regulation, as a matter of fact it should not be called "regulation." It is comparable to a trade union or other interest-protecting organization.

b) If membership in the organization is compulsory, than the structure does not differ in anything from a professional chamber.

c) If membership is not required, but state recognizes the norms as official and effective to every citizen, than it does not differ from an authority.

Conclusion:

Self-regulation develops responding to the needs set by the new circumstances, without state interference. Law should follow socially developed norms, and not go ahead of them. They should be let to develop in practice first, and then be stabilized by state, if necessary. Self-regulation can be regarded as experimenting with the rules, developing and testing them in practice.

Neither self-, nor co-regulation is an answer to the problem of illegal content, because limitation of speech can be prescribed by law only.

Self-regulation may be a response to harmful content, because it is voluntary, and the tools provided by it can be used voluntarily.

Co-regulation cannot apply to harmful content, because when it would come to a compulsory enforcement, it would impose a ban on otherwise legal speech. It would ban constitutionally protected speech by rules that have not been passed through the Parliament, as it happens in Australia.

Voluntary actions taken by industrial actors should be welcome, because they may form a ground on which the internet rules can develop.

State should encourage self-regulation but not interfere. Co-regulation raises constitutional problems. However, it should be weighed whether these problems are solely theoretical, or effect in merit the democratic principles. It should be taken into consideration, whether the positive aspects of co-regulation overweight the negative ones.

Co-regulation is recommended with the following conditions:

1. Type 2 is recommended without condition.

2. Type 3 is recommended only if the mandated organization is the only one on the market.

3. Type 3, 4 and 5 are recommended with the condition that the decision-making persons of the organization are selected through a voting procedure. Professional and civil organizations who would like to participate should form panels and appoint a delegate together in a democratic procedure. Preconditions for appointments should be defined by the panel. The rules of voting should be defined by the organization in question, in case of type 4 by the first set of rules shall be defined by the government, and in future by the organization itself.

The balance between citizens' and private interests should be maintained. The state should give preference to non-interference as opposed to interference. The exception are those fields where active measurements are required so as to preserve human rights.

Market interests sometimes equal with consumers' interests, and these sometimes equal with citizens' interests.

But often citizens' interests, such as human rights are not respected by the market. Therefore appropriate measurements should be taken in order to protect human rights, opposing commercial corporations.

Governmental regulation should stand up for the citizens' rights in contrast to the interests of commercial lobby groups, because they get their constitutional empowerment from the people and not from commercial actors.

One area of interference should be the protection of computer data and privacy. Computer data should deserve the same protection as personal data. Often an email-address or an IP address cannot be primarily connected to a certain person, still its abuse invades privacy. A consumer profile can be set up about a person without knowing his or her name.

Second, appropriate measures should be taken for the realization of freedom of expression. Although private corporations have the right to decide what they allow access to, or what they allow to upload to their servers, citizens should have the choice to turn to another provider, if they are refused by one. Thus, state should prevent the formation of access monopolies, and prohibit general filtering of internet content. (see below in more detail)

2. Proposals for filtering

Basic assumptions

Filters are tools of self-regulation. They have been developed so that users can filter the content that they can get access to, with the prior aim in sight that minors do not get access to pornographic sites and other harmful content.

It must be kept in sight that content that is harmful for minors, is not illegal. Harmful content includes sexually explicit content, educational or medical sites about sexuality, and information about diseases. Beyond harmful content several sites are not suitable for children either, for example academic sites, political sites that should be understood in a context, and other aspects of the adult society. Nobody prepares children today how distinguish authentic information from hoax.

As the Supreme Court of the United States declared, “the odds are slim” that a user would accidentally encounter any content that they did not wish to see. Children can easily learn how to avoid unwanted content. After this age, filtering serves to control, rather than to protect the child, to achieve that the child does not intentionally visit “bad” sites.

Filters can serve to supervise not only children, but any other person whose internet access is controlled. It is a secondary question, who exercises the control: parents, library, school, state, workplace?

The purpose of filtering should be protection of small children from harmful content, who are not yet mature enough to protect themselves.

Any other filter use is not aimed at protection, but at control: restricting the user to visit pages that are thought to be immoral, or otherwise unacceptable by society.

However, there appears to be a social need for such control. Such a need is expressed by educators, by employers, by some of the librarians, some of the governments and some parents. A protest against such control is expressed by other actors, led by civil rights organizations, such as GILC.

Beyond the protection of small children, there are two, generally accepted explanations: the first is to control teenagers’ overwhelming consumption of sexual content, and the second is to prevent that people exercise their rights disturbing others in public spaces.

I argue that both goals can be better achieved through education than making access impossible, because:

a) prohibitive measures tend to lead to techniques of evasion, particularly with teenagers. Education should yield better result on the long run.

b) filtering is inherently not perfect. It lets through pages that ought to be blocked, while blocks pages with useful content. This is not a temporary feature of filtering: it will always remain imperfect, because a simple technological selection system can never give back the variety of human thinking and value-judgment.

The existence of filters does not relief parents, teachers, etc. from the responsibility of taking care of children. Filter should not be regarded as a tool in education. It is in fact an aggressive mean of control.

It should be noted, that the more perfect a filtering technology is, the more perfect control it enables, and this control can be misused as well.

Proposals:

1. State should **encourage voluntary filtering by spreading information about the possibility and the use of filtering.** At the establishment of a home internet-connection the user shall get information from the service provider about the existence and the use of filter software.

Pros: users learn to take informed decision. Education about the possibility of filtering raises awareness of parents of young children.

Cons: costs of education

2. To **make a Hungarian filtering system**, the state should give a mandate to a private company to create a PICS compatible rating system in Hungarian language, as close to the ICRA rating system as possible. The rating should be offered on a Hungarian website for free. After the creation of the software, the only costs are hosting and maintaining the page. Offering a separate filter is possible, but not necessary, since all surfers include a filter system.

Pros: include Hungarian pages in the first-party rating system.

Cons:

- ? *in the content-providers' community, whether commercial or not, the English language is not typically a problem.*
- ? *if all sites get rated, it enhances the technology of control, and allows more possibilities to misuse the system.*
- ? *noone can check whether first-party rating is made appropriately.*

3. **Rating should not be made compulsory.**

There are two aspects of making rating compulsory.

a) only harmful sites have to be rated

Pros: at least the content providers of non-harmful sites do not have to rate.

Cons:

- ? *the definition of harmfulness is problematic*
- ? *noone has authority to decide whether a site is harmful or not*
- ? *it poses an extra burden on publishers of harmful content, even though it is lawful speech (it may include medical, educational sites as well).*
- ? *it is not effective in making a child-friendly Internet*

b) all sites should be rated

Pros: there is no discrimination between publishers of lawful speech on the basis of harmfulness.

Cons:

- ? *it imposes even more burden on free speech*
- ? *still not effective against foreign pages*
- ? *enables a perfect control over Hungarian websites. This could even result in a total control of Internet content, which should be avoided.*

In both cases the question whether the site is appropriately rated remains open. The forum for decision about this could be a court or a self-regulatory organization.

(Alternative proposal:

In case rating of harmful content is made compulsory inspite of my proposal, then at least its control should be performed only by a self-regulative body. In the frames of such a self-regulatory body, a committee consisting of representatives of parents', teachers and children's organization should mediate, and resolve about the appropriate rating in case of dispute. The maximum sanction should be removing content until it becomes rated accordingly.)

Pros of compulsory rating:

- It enables control of Hungarian sites. – if it is used for protection of children.

Cons:

- *It enables control of Hungarian sites.- if used for censorship, abuse of personal information.*
- *It may exercise a chilling effect on speech.*
- *It requires an expensive control mechanism – to check whether the sites have been rated, remove it if not, check whether it was appropriately rated.*
- *noone has authority to decide whether rating was done appropriately*

4. **General filtering made by ISPs should depend on the decision of the subscriber. ISPs are not obliged to offer central filtering.**

No cons.

5. General filtering in libraries should be prohibited.

a) Opt-in: Libraries shall have filtering software and switch them on upon the request of the parent or the child. Indecent use of the computers shall be regulated by the tap-on-the-shoulder method.

Cons:

- ? *lower level of security and control of the child.*
- ? *librarians should act as a host – tap on the shoulder is less comfortable for them than preventing access (or having no computer at all in the library).*

Pros: higher level of self-determination and freedom of information

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b) Opt-out: Libraries shall have separated computers for children under 10. These children shall have access to the adult computers with parental consent. Older children should receive

filtered access if requested. Their, and adults' internet use shall be regulated by the tap-on-the-shoulder method.

Pros: higher level of self-determination and freedom of information for children over 10, while more protection for smaller children.

Cons:

- *more computers are needed.*
- *it is an additional burden on librarians to check the age of children.*

Libraries shall be encouraged to have a Code of behavior which prohibits the visiting of pornographic pages. In case this happens, the patron may be barred from using the Internet in the library.

6. Schools should be allowed to have their own policy, but an opt-out possibility shall be maintained for parents. Parents should have the right to request that their child has unlimited access in schools. Parents, teachers and the school community should have an influence on the school's policy

Pros:

- *parents can choose which school their child should go to*
- *parents have possibility to individually form their child's access to information*
- *enjoys all advantages of local level decision-making*

Cons: often those children with disadvantageous circumstances will have the least chance to get unlimited access, because of the ignorance of the parents and of the school.

7. Universities and institutions of higher education should be prohibited to use general filter compulsorily. *They should influence students with their policy.*

Pros: Such institutions should stay on the basis of unlimited access to all information, on the basis of ideological neutrality.

Cons: Using the Internet to purposes other than the university's function may cause a financial loss, legal consequences, and crowded computer labs to the institution.

8. Filtering must not be used against illegal content. Instead, it is to be considered that all criminal prohibitions on speech are nullified.

The European Parliament issued a decision in April 2002 in which they condemn using blocking techniques as a tool of regulation.[1] "Blocking is damaging to both the Internet industry and to consumers. Since blocking is technically difficult, democratically questionable and undoubtedly inefficient, we believe that resources being targeted at this issue should be invested into more effective methods of addressing the problems, such as hotlines, rating systems and, above all, the provision to the public of clear and accurate information on how they can effectively control the content they see."

[1] http://www.euroispa.org/docs/childprot_final_110402.pdf

Spain and Germany block illegal content on the basis of court decision, even though it is not effective, because already the other day the banned site can be accessed from other URL, other server, or through anonymizers, translator sites or archive-pages of the Google. (Through the loopholes, see chapter Filters.)

Apparently, national control over content prohibited by national legal rules is no more possible. Nation states should face this, and react accordingly.

The German court of Munster said that even if blocking is ineffective, it cannot watch "with the hands in its lap" that illegal content is accessible. But the European Court of Human Rights (ECHR) held that the restriction violated Article 10, if the restriction could not effectively prevent the spreading of information.[2]

Pros for nullifying speech restrictions:

1. Maintaining these provisions would lead to an endless battle against hate speech without success, spending a lot of effort and money in vain.

2. If a law cannot be enforced, it has a derogating effect to the whole legal system, because it leads to inconsequence, the diminishing respect of laws, finally to legal insecurity.

2. Hate speech is a syndrome of a social problem. It is not the speech, but the act which should be banned. Discrimination and xenophobia should be treated through education and affirmative actions in favor of minorities. Speech should be treated as a social thermometer.

3. According to Milton's theory, the remedy for speech is more speech, and finally the truth will win. The internet allows a possibility for everyone to respond to offending speech, because it is the first medium ever with no scarcity.

5. The lack of these provisions would cause less damage than the threat to legal security.

Cons:

1. According to Fiss' theory, hate speech

a) degrades the opinions of those attacked. Therefore even the unlimited possibility to respond would not help, because the denigrated groups' voice would not be listened to.

b) discourages the attacked group to express their ideas.

[2] Observer & Guardian v. United Kingdom, 1991, november 26.

http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=819104055&Notice=0&Noticemode=&RelatedMode=0

Cybercrime

Proposals to the Ministry of Informatics, to the content of legal regulation.

The Cybercrime Convention lists a range of computer crimes and procedural rights of the investigative authorities. It requires that the states provide the biggest possible help to each other in the field of criminal investigation.

Harmonizing computer crimes is a legitimate need, as is the need of the states to strengthen cooperation and widen the scope of investigative powers. However, this cannot take place without the guarantee of human rights.

The Cybercrime Convention does not contain any guarantee of human rights, although that is supposed to be the mission of the Council of Europe.

Prestigious human rights organizations have criticized it in merit, such as the American Civil Liberties Union (ACLU), the Electronic Frontier Foundation, Center for Democracy and Technology, the Cyber-Rights and Cyber-Liberties.

Therefore, Hungary should stand up openly for a review of the Convention, rather than submitting its ratification. It should do so because the Convention is open for countries who are non-members to the Council of Europe, and therefore have not signed the European Convention on Human Rights. Their legal system may respect human rights to a lesser extent than Hungary's. Under the umbrella of the Cybercrime Convention such countries should have full right to demand traffic and content data about Hungarian citizens. It would even be possible that a foreign country, where adultery is a crime, would turn to the Hungarian authorities and request traffic information about their citizen who committed adultery and who fled to Hungary. They could even request traffic data and content information about a Hungarian citizen who may have committed a crime under foreign law, but not under Hungarian law; for example by posting sexually explicit pictures on the Net.

Hungary's Parliament has already decided about ratification of the Cybercrime Convention (82/2002. OGY határozat) but have not deposited it to the Chief Secretary of the Council of Europe yet.

1. The ratification published by the 82/2002. OGY határozat should be amended according to my proposals mentioned in points 5. and 6. It should not be sent before it gets amended.

2. The ministry should prepare and submit a draft law to incorporate in the 2002. IV. Act on international cooperation in connection with crime prevention. The amendment should provide for that international cooperation should be performed only in connection with actions which are criminalized in both countries.

3. The ministry should issue an international communiqué in which it expresses its objections against the Convention. Reasons: it does not provide for any protection of privacy, and does not set the limits of state intervention.

4. Hungary should not sign the Protocol against Racism and Xenophobia.

The Council of Europe drafted a Protocol to the Cybercrime Convention against Racism and Xenophobia. This Protocol requires the criminalization of several forms of racial and hate speech, which are not criminalized in Hungary. Signing the Protocol would result that certain forms of speech would be crimes when made online, but legal, if made offline.

It is not necessary to introduce more heavy restrictions on online speech than there are on offline speech.

Please see the reasons for deregulation of hate speech in the previous section "filters".

5. Possession and acquisition of paedophile pictures should be decriminalized.

The effective Criminal Code penalizes acquisition and possession of paedophile pictures without requiring any purpose with up to three years loss of liberty. (§ 195/A.)

The possession of such pictures can be realized even without the knowledge of the perpetrator. Computers save automatic copies of websites, even if it was opened for only a second. An average user may not know about the existence of such copies.

Forbidden pictures may be received through email without the knowledge of the user.

Possessing such pictures may raise the suspicion that the person distributes the pictures or engages in paedophile actions. But in the absence of these further actions, there is no harm caused to society.

In fact, the punishment is imposed for a suspicion that the person possessing the pictures is a paedophile and may engage in other paedophile actions. This is obviously a violation of the presumption of innocence.

Possessing paedophile pictures is not equal with causing harm violently to a child. No one can be punished for actions they did not carry out. Do you commit a crime if you think of a murder, or see a picture of it? Thoughts should not be punished!

The Cybercrime Convention allowed making a reservation against these crimes. Hungary should use this possibility and abolish this being a crime.

6. The making, distributing, etc. of pictures that virtually depict a minor should be decriminalized.

The pair of this provision, pictures that **appear to** depict a minor was not included in the Criminal Code by the Hungarian legislation, because Hungary has used the possibility and made a reservation against it. It should do the same with this provision. If there is no minor included in the sexual activity shown on the picture, then no actual harm is caused to any concrete minor.

7. Criminal libel and insult should be decriminalized. The Criminal Code now threatens these speeches with loss of liberty up to two years. (§§ 179, 180, 181)

Please see the reasons against filtering illegal content, in the previous section.

The solution against racial discrimination and xenophobia is not suppression of speech. Instead, affirmative actions should be made to improve the chances of minorities, educate teachers on how to handle the problem and how to train children about this problem. This feature of Internet communication should be exploited to raise tolerance in the society, and to generate public opinion contrasting xenophobic minorities' opinion.